HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HELENSBURGH COAL PTY LTD**
Appellant

and

NEIL BARTLEY AND OTHERS NAMED IN THE SCHEDULE TO THE NOTICE OF APPEAL
Respondents

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES PRESENTED BY THE APPEAL

2. In determining whether a dismissal is a case of "genuine redundancy" under s 385(d) and s 389(2) of the *Fair Work Act 2009* (Cth) (**FW Act**), is the Fair Work Commission (**FWC**) permitted to consider whether the employer could have made alternative changes to its enterprise, as that enterprise existed at the date of dismissal, including by terminating other operational or staffing arrangements, so as to create or make available a position to which an otherwise redundant employee could reasonably have been redeployed?

3. Is the determination required to be made under s 385(d) and s 389(2) of the FW Act a "discretionary" decision which can be interfered with on appeal only in accordance with the test in *House v King*?

PART III: SECTION 78B NOTICE

4. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATIONS

5. The judgment of the Full Court of the Federal Court of Australia is reported as *Helensburgh Coal Pty Ltd v Bartley* (2024) 302 FCR 589 (**FC**).

6. The matters addressed by the Full Court were the subject of the following earlier decisions of the FWC:

   (a) The judgment of Riordan C dated 24 December 2020, which is unreported. Its medium neutral citation is *Bartley v Helensburgh Coal Pty Ltd* [2020] FWC 5756 (**First Decision**).

   (b) The judgment of the Full Bench of the FWC (Catanzariti VP, Bissett C and Wilson C) dated 19 May 2021, which is reported as *Helensburgh Coal Pty Ltd v Bartley* (2021) 306 IR 219 (**Second Decision**).

   (c) The judgment of Riordan C dated 24 December 2021, which is unreported. Its medium neutral citation is *Bartley v Helensburgh Coal Pty Ltd* [2021] FWC 6414 (**Third Decision**).

   (d) The judgment of the Full Bench of the FWC (Catanzariti VP, Bissett C and Wilson C) dated 1 September 2022, which is unreported. Its medium neutral citation is *Helensburgh Coal Pty Ltd v Neil Bartley* [2022] FWCFB 166 (**Fourth Decision**).

PART V: FACTS

7. The respondent employees were employed by the appellant at the Metropolitan Coal Mine (the **Mine**) (**FC [3] CAB 139**).

8. Some of the work at the Mine was undertaken by contractors.

9. On 1 August 2018, Nexus Mining Pty Ltd (**Nexus**) was engaged (by an associated entity of the appellant) to provide various services at the Mine (**FC [10] CAB 140**). The Nexus contract was for a period of two years (**FC [10] CAB 140**), with a twelve month extension (**Third Decision [68(b)] CAB 71**).[1]

[1] See also the appellant's Book of Further Material (**ABFM**) at 14 [6].

10. In early 2019, after a fire at an underground conveyor at the Mine, Mentser Pty Ltd (**Mentser**) was engaged to undertake an inspection of the Mine's conveyor systems (**FC [10] CAB 140**).

11. Later in 2019, it was resolved that work involving the servicing, inspection, auditing and rectification of the Mine's underground conveyor systems would be outsourced to Mentser (**FC [10] CAB 140**).

12. In March 2020, Mentser was formally engaged (by an associated entity of the appellant) and Mentser commenced providing those services from April 2020 (**FC [10] CAB 140**). The Mentser contract was for a period of up to five years (**Third Decision [68(b)] CAB 71**), comprised of a period of three years with the option of extension for a further two years.[2]

13. At around that same time, the COVID-19 pandemic caused the market price of coking coal to fall significantly (**FC [11] CAB 141**).

14. In May 2020, the appellant gave notice that it had resolved to eliminate one day of production and to consolidate its workforce into four crews, rather than five (**FC [11] CAB 141**). This would require fewer workers (**FC [11] CAB 141**).

15. As part of the consultation process that followed, the appellant committed to insourcing certain parts of the work being carried out by Nexus. However, the appellant did not agree to insource the work being undertaken by Mentser or the balance of the work being undertaken by Nexus, which was ongoing (**FC [12] CAB 141**).

16. The respondent employees were dismissed from their employment on 24 June 2020 (**FC [14] CAB 141**) "as a result of a decision that was made to reorganise the performance of work at the [M]ine" (**FC [3] CAB 139**).

17. It was not in dispute that s 389(1)(a) of the FW Act was satisfied (**Second Decision [5] CAB 27; Fourth Decision [32] CAB 109**). The respondent employees' jobs were no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. And it was later found that the consultation requirement in s 389(1)(b) of the FW Act was satisfied (**Second Decision [6] CAB 27;**

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[2] See also ABFM at 8 [11].

Fourth Decision [32] CAB 109). The question for determination under s 389(2) was whether "it would have been reasonable in all the circumstances for the [respondent employees] to be redeployed within [the appellant's] enterprise" or "the enterprise of an associated entity of the [appellant]".

18. It was also not in dispute that, at the time of their dismissal, there was no vacant role to which the respondent employees could be redeployed, nor was it foreseeable that one would become available, except by demobilising workers engaged by either Nexus or Mentser.

19. Rather, as recorded by the Commissioner, the respondent employees' argument was that removing Mentser and Nexus employees from the Mine would result in redeployment opportunities becoming available (**First Decision [30] CAB 17**) and that the appellant should have taken steps to redeploy the employees to perform the work vacated by the contractors (**First Decision [18] CAB 15**; **Third Decision [65] CAB 69**).[3]

20. When the respondent employees were dismissed, there were eight Mentser employees and approximately ninety Nexus employees working at the Mine (**FC [14] CAB 141**).

21. There was uncontested evidence that if Mentser employees were removed from the Mine, and their work taken over by the appellant's employees, this would have had a significant adverse impact on Mentser's business. It would also have led to the "almost inevitable" dismissal of the employees Mentser had deployed to the Mine.[4]

22. Similarly, there was uncontested evidence that if work had been redirected from Nexus, it would also have "likely" resulted in the "vast majority" of any cohort that was replaced being dismissed, which in turn would have led to the "loss of core expertise which would have been difficult [for Nexus] to replace".[5]

23. On about 10 July 2020, each of the respondent employees filed an application for unfair dismissal remedies pursuant to s 394 of the FW Act (**FC [15] CAB 141**).

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[3] See further FCFC Application Book, Part C at 125-126 (submissions of the respondent employees, 28 September 2020 at [29]-[30]); FCFC Application Book, Part C at 240, 245, 251-252 (submissions of the respondent employees, 10 March 2021 at [2], [13(b)], [24]-[25]); FCFC Application Book, Part C at 332 and 338 (submissions of the Respondent employees, 6 September 2021 at [1], [2], [23]-[26]).

[4] ABFM at 8-9 [14]-[15] referred to in the Third Decision at [27] CAB 58.

[5] ABFM at 16 [17]-[18] referred to in the Third Decision at [26] CAB 58.

24. As required by s 396(d) of the FW Act, the issue of whether the dismissals were cases of genuine redundancy was addressed as a threshold question.

25. In the First Decision, the Commissioner held that "it would have been reasonable for [the appellant] to insource some, if not all, of the work … being undertaken by both Nexus and Mentser and redeploy its dismissed employee[s] into these roles" (**First Decision [63] CAB 24**).

26. This decision was quashed on appeal. However, the Full Bench of the FWC stated that "whether work could or should be insourced is … a necessary matter to decide as part of the inquiry as to whether it [was] reasonable, in all the circumstances, to redeploy the employees to that work" (**Second Decision [91] CAB 44**).

27. On a remitted hearing, the Commissioner found that it was "feasible" for the appellant to have insourced so much of the work being undertaken by Nexus and Mentser as would have avoided the dismissal of the respondent employees such that their dismissals were not genuine redundancies (**Third Decision [94]-[108] CAB 82-84**).

28. On appeal, a second Full Bench held that the Commissioner had erred in failing to consider "the effect of insourcing on employees" of Nexus and Mentser. Despite this, the second Full Bench declined to re-exercise the "discretion" (**Fourth Decision [74]-[75] CAB 116**).

29. By an originating application filed on 18 November 2022, the appellant applied to the Federal Court contending that the decisions of the FWC were affected by jurisdictional error. Relevantly, the jurisdictional error was said to lie in a misconstruction of s 389(2) of the FW Act, and in the adoption of the *House v King* standard of appellate review under ss 604 and 607 of the FW Act. The Full Court dismissed the application.

30. Katzmann and Snaden JJ delivered a joint judgment, with which Raper J did "not disagree" and agreed "generally" (**FC [93] CAB 164**).

31. Katzmann and Snaden JJ:

    (a) Noted that the Commissioner held that the dismissals were not genuine redundancies because "it would have been reasonable to reduce the work available to contractors and to redeploy the employee respondents to undertake the work thereby created" (**FC [28] CAB 145**).

(b) Noted that the Full Bench of the FWC did not find any error in this approach (**FC [31]-[33] CAB 148**).

(c) Proceeded to reject the appellant's challenge to this conclusion, holding that:

(i) section 389(2) (combined with s 385(d)) authorised an inquiry as to whether "there were measures that could have been taken and which, in all the circumstances, could reasonably have led to redeployment …" (**FC [59] CAB 156**);

(ii) "there is no reason to excise from 'all [of] the circumstances' the possibility that an employer might free up work for its employees by reducing its reliance upon external providers" (**FC [60] CAB 157**);

(iii) "[w]hether redeployment 'would have been reasonable in all [of] the circumstances' requires analysis of what an employer could have done apart from dismissing the employee" (**FC [64] CAB 157**);

(iv) "[i]f … there is reason to think that an employer could have taken steps that would have enabled redeployment in preference to dismissal, that possibility may fairly be brought to bear upon the FWC's assessment of what 'would have been reasonable in all [of] the circumstances'" (**FC [66] CAB 158**).

32. Further, their Honours rejected the appellant's argument as to the standard of appellate review to be applied under ss 604 and 607 of the FW Act, holding that the threshold jurisdictional question of whether there was a genuine redundancy within the meaning of ss 385(d) and 389(2) of the FW Act:

(a) had "no uniquely correct answer" (**FC [78] CAB 161**);

(b) "rests upon value judgments or opinions that are untethered from fixed standards" (**FC [80] CAB 161**).

PART VI: ARGUMENT

Grounds 1(a) and 1(b): the proper construction of s 389

33. The first error in the Full Court's approach is that it fails to give effect to the whole of the key phrase in s 389(2)(a) – "reasonable in all the circumstances for the person to be redeployed within … the employer's enterprise".

34. The Full Court gave undue prominence to the breadth of the expression "in all the circumstances" (**FC [57], [58], [60], [62], [64]-[66] CAB 156-158**), without addressing important objective reference points within the key phrase.

35. One important objective reference point is to be found in the expression "within … the employer's enterprise".[6] This directs attention to the employer's enterprise as at the time of the relevant dismissal. It serves to anchor the inquiry to an existing state of affairs, and thereby to provide simplicity and certainty. The question is not whether it would have been reasonable for the person to be redeployed in the abstract, but rather whether it would have been reasonable for the person to be redeployed within the existing state of affairs which is "the employer's enterprise" as it was at the time of the relevant dismissal.

36. Another important objective reference point is to be found in the term "redeployed". Redeployment does not mean, and should not be confused with, replacement.[7]

37. That the Full Court did not consider the significance of these objective reference points is confirmed by its express statement (in the context of the *House v King* issue) that the determination "rests upon value judgments or opinions that are untethered from fixed standards" (**FC [80] CAB 161**). This is not correct. There are fixed standards embodied in three distinct components of the key phrase: "reasonable", "redeployed" and "the employer's enterprise".

38. The second, and related, error lies in reading s 389(2) as conferring on the FWC a broad authority to consider what alternative changes could have been made to the employer's enterprise to enable redeployment without regard to context.

39. An important contextual consideration is that, save in respect of a sham (which was not alleged here), it has never been within the authority of the FWC (or predecessor industrial courts or tribunals) to gainsay the reasonableness of any change in operational requirements that triggered an employee's redundancy. [8]

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6 "Enterprise" is defined in s 12 of the FW Act to mean a "business, activity, project or undertaking".

7 *Fisher & Ors v Downer EDI Mining* [2013] FWC 8020 at [83] (Cambridge C).

8 See *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 97 ALJR 711 (***Qantas Airways***) at 729 [99]-[100] (Steward J) referring to *Jones v Department of Energy and Minerals* (1995) 60 IR 304 (***Jones***) at 308 (Ryan J); *Quality Bakers of Australia v Goulding* (1995) 60 IR 327 (***Quality Bakers***) at 333-336 (Beazley J); *Mitchell-Collins v The Latrobe Council* (1995) 60 IR 480 at 489-491 (Spender J). See also *Dibb v Commissioner of Taxation* (2004) 136 FCR 388 at [34]-[38] (Spender, Dowsett and Allsop JJ), which

40. As Steward J observed in *Qantas Airways* at [100]:

> Industrial law has long recognised that genuine redundancy, defined over the years in various ways, is a legitimate and acceptable reason for the termination of employment. As Ryan J famously observed in *Jones v Department of Energy and Minerals* [(1995) 60 IR 304 at 308], it is an employer's "prerogative". In the full passage from which this expression emerges, his Honour said:
>
> > "[I]t is within the employer's prerogative to rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions."

41. The corollary of this foundational proposition is that it is not within the authority of the FWC to impose its own view as to what should reasonably have been done (or what could have been done) to reorganise an employer's enterprise to accommodate a change in operational requirements. That is especially so where, as here, the FWC would have the employer terminate existing operational staffing arrangements in order to "free up work" (**FC [60] CAB 157**) for otherwise redundant employees, contrary to the employer's own judgment as to how its operational requirements would best be met.

42. This accords with the "clear legislative contemplation"[9] evident from the explanatory memorandum (**EM**) to the *Fair Work Bill 2008* (Cth). One of the circumstances given in the EM as to when redeployment would not be "reasonable in all the circumstances" was if there are "no positions available for which the employee has suitable qualifications or experience".[10] It further stated "[w]hether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy".[11] That is in contrast to the historical position where, in addition to testing whether there was a causal link between a redundancy and dismissal,[12] the relevant court or tribunal *was*, in dealing with an unfair dismissal application, entitled to assess matters of procedural and substantive unfairness in a particular employee's

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applied *Jones* and *Quality Bakers* in the context of s 27F of the *Income Tax Assessment Act 1936* (Cth) dealing with the tax treatment of *bona fide* redundancy payments.

9 Cf. *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 623 (***Miller***) at 628 [23] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

10 EM at [1552].

11 EM at [1553]. See also *Kekeris v A Hartrodt Australia Pty Ltd t/as a.hartrodt* [2010] FWA 674 at [29].

12 *Industrial Relations Act 1988* (Cth), s 170DE(1); *Workplace Relations Act* 1996 (Cth), ss 170CE(1)(a) and 170CG(3)(a); *Re Windsor Smith* (1998) 140 IR 398 at 404 (Giudice J, Polites SDP and Gay C).

selection for redundancy.[13]

43. The EM tells against the FWC standing in the shoes of the employer and deciding which workers (whether they be direct employees or engaged by external contractors) ought to have been dismissed or displaced, although that would be the effect of the Full Court's construction. The "[i]llustrative example" contained in the EM[14] makes clear that the sort of counterfactual analysis inherent in the Full Court's construction is outside the scope of the FWC's function. The difficulty with the Full Court's approach can also be explained by reference to the factual findings made in this case. The Commissioner ultimately found that there was a sufficient number of contractor employees who could have been displaced to make room for each of the 22 respondents (**Third Decision [94] CAB 82**). However, what if the Commissioner had found that fewer than 22 of the contractor employees could have been displaced? That would necessarily have led him to assess who among the respondent employees should have been retained and who should have been selected for termination. That is precisely the sort of analysis that, according to the EM, should not be undertaken.

44. Importantly, the appellant's approach accords with the legislative objects of Part 3-2 of the FW Act, which include "establish[ing] procedures for dealing with unfair dismissal that … are quick, flexible and informal".[15] On the Full Court's reasoning, any change that results in redundancies would open up a broad ranging inquiry by the FWC into the nature of the changes in the operational requirements and the universe of changes that could theoretically have been made to the employer's enterprise with a view to redeploying otherwise redundant employees. This is more than the introduction of a tolerable "measure of complexity" (**FC [61] CAB 157**). It is antithetical to the FW Act's express legislative aspirations[16] and it misunderstands the mischief that the introduction of s 389 was intended to address.[17]

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[13] Andrew Stewart et al, *Creighton & Stewart's Labour Law* (The Federation Press, 6th ed, 2016) at [23.74] and the cases cited therein. The EM (at [1553]) further makes clear that if an employee's selection for redundancy is tainted by unlawful considerations, that employee may have a cause of action under the general protections provisions of Part 3-1 of the FW Act.

[14] EM at [1553].

[15] FW Act, s 381.

[16] Cf. *Miller* at 630 [38] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

[17] Parliament's objective intent was to reinstate the pre-*WorkChoices* position that, in exercising its statutory unfair dismissal jurisdiction, the AIRC could have regard to whether there were actually or foreseeably available redeployment opportunities as at time of dismissal: see Shi, Elizabeth 'A Tiger With No Teeth: Genuine Redundancy and Reasonable Redeployment' (2012) 31(1) University of Queensland Law Journal

45. The inquiry authorised by the legislation is much simpler. It takes the employer's enterprise as it exists as at the date of dismissal (which encompasses the change in operational requirements and any reorganisation which has been implemented) and asks whether it would be reasonable in all the circumstances for the person to be redeployed within *that* enterprise. If there is no available position, work or activity to which they could reasonably be redeployed within that enterprise (or the enterprise of an associated entity), then that is the end of the matter. The legislation does not authorise a further inquiry as to whether the employer's enterprise could have been subjected to additional or different changes which could have freed up or created a new position, or some new work or activity, for the otherwise redundant employee.

46. Contrary to the Full Court's suggestion (**FC [63] CAB 157**), the possibility that there will not be a genuine redundancy where an employee may have remained employed for a short period pending a position becoming available does not cause any difficulty for the appellant's argument. The "employer's enterprise" is the state of affairs existing as at the date of the dismissal. That state of affairs will be inherently dynamic. It may be known or predicted that positions will become available in the short term[18] (though that was not the case here). That will be a feature of the state of affairs that is the employer's enterprise as at the date of dismissal. But the focus is still upon that state of affairs as at the date of dismissal. The focus does not divert to some alternative state of affairs preferred by the FWC upon its subjective assessment, untethered from fixed standards, as to how the employer could or ought to have changed or restructured its enterprise.

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101 at 104-110 and *Carter v Village Cinemas Australia Pty Ltd* [2007] AIRCFB 35 (Drake SDP, Kaufman SDP, Eames C). As to how redeployment opportunities (among other factors) were dealt with in unfair dismissals prior to *WorkChoices*, see, by way of example: *JJ Richards* [1999] AIRC 747 at [32]-[33], [36]-[48] (Smith C); *E Ballard v South Pacific Tyres* [2000] AIRC 483 at [124] (Hingley C); *Panaretos v Northern Land Council* [2000] AIRC 805 at [37] and [46] (Gay C); *Papagiannopoulos and Hristakos v Coogi Australia Pty Ltd* [2001] AIRC 874 at [29]-[30], [62], [70]-[73] (Eames C).

[18] See for example *Piemyoosuk v Como Glasshouse No 2 Pty Ltd* [2024] FWC 1550 at [94] (Anderson DP) where the FWC held that it would have been reasonable to retain a dismissed employee for the purposes of redeploying them to a role that was due to become vacant because of another employee's scheduled parental leave.

47. Having regard to the way in which the matter was run at all times below, if grounds 1(a) and 1(b) are accepted, that would necessarily dispose of the respondent employees' applications and *prohibition* should therefore follow.

Ground 2: The appropriate test for appellate review

48. The Full Court held that the *House v King* standard applied to the exercise of the appellate jurisdiction of the Full Bench of the FWC under ss 604 and 607 of the FW Act in respect of an appeal against a determination under s 385(d) and s 389(2) of the FW Act. In doing so, the Full Court held that the determination of this critical threshold, jurisdictional question:

10 (a) had "no uniquely correct answer" (**FC [78] CAB 161**);

(b) "rests upon value judgments or opinions that are untethered from fixed standards" (**FC [80] CAB 161**).

49. As has already been observed, it is incorrect to say that the determination under s 385(d) and s 389(2) is untethered from fixed standards. There are fixed standards embodied in three distinct components of the key phrase within s 389(2): "reasonable"; "redeployed" and "the employer's enterprise". Properly applied, these standards yield but one legally permissible answer to the question posed by ss 385(d) and 389(2).

50. The correctness standard of appellate review requires that "the appellate court determines for itself the correct outcome while making due allowance for such
20 'advantages' as may have been enjoyed by the judge who conducted the trial or hearing".[19] In contrast, the discretionary standard requires "judicial restraint affording latitude to a trial judge" with appellate intervention limited to the grounds set out in *House v the King*, which grounds "contemplate the appellate court accepting that intervention is not warranted even though the members of the appellate court may have decided the matter differently to the judge at first instance".[20]

51. The dividing line between those standards "is not bright; but is tolerably clear and workable".[21] It depends not on whether "a conclusion can be characterised as

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[19] *Moore (a pseudonym) v The King* (***Moore***) (2024) 98 ALJR 1119 at 1124 [14] (Gageler CJ, Edelman, Steward, Gleeson, Beech-Jones JJ).
[20] *Moore* at 1124 [14] (Gageler CJ, Edelman, Steward, Gleeson, Beech-Jones JJ).
[21] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 (***SZVFW***) at 564 [49] (Gageler J); see also at 571-572 [75]-[76] (Nettle and Gordon JJ).

evaluative or is on a topic on which judicial minds might reasonably differ"[22] but rather on "whether the legal criterion applied or purportedly applied … demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies".[23] In other words, the correctness standard will apply to "questions to which there is but one legally permissible answer, even if that answer involves a value judgment".[24]

52. There is a "danger" in mistaking a decision that concerns an evaluative and uncertain legal issue with one that attracts judicial restraint.[25] Whether such restraint applies to any statutory source of power is necessarily informed by the terms of the statute itself,[26] including by reference to whether it creates a "legal norm"[27] and the "breadth of the decision making power afforded to the primary decision maker".[28] It matters not whether the appeal is brought from an interlocutory or final decision.[29] A single statutory provision may found a variety of exercises of power, with some attracting the deferential standard and others attracting the correctness standard.[30] The application of the proper standard of appellate review is an important issue of substance and the adoption of the wrong standard will amount to jurisdictional error.[31]

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22 *SZVFW* at 563 [49] (Gageler J); see also at 571-572 [75]-[76] (Nettle and Gordon JJ); *Moore* at 1124 [16] (Gageler CJ, Edelman, Steward, Gleeson, Beech-Jones JJ).

23 *SZVFW* at 563 [49] (Gageler J);

24 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 (***GLJ***) at 865-866 [16] (Kiefel CJ, Gageler and Jagot JJ), 881 [95] (Steward), 892 [161] (Gleeson J).

25 *SZVFW* at 589-590 [147] (Edelman J).

26 *SZVFW* at 592 [151] (Edelman J); *GLJ* at 881 [91] (Steward J).

27 *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138-139 [40] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

28 *SZVFW* at 592 [152] (Edelman J).

29 *Moore* at 1125-1126 [21] and [25] (Gageler CJ, Edelman, Steward, Gleeson, Beech-Jones JJ). However, as to interlocutory decisions in respect of matters of practice and procedure see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-177.

30 Cf. *GLJ* at 868 [24] (Kiefel CJ, Gageler and Jagot JJ). See also *Keane v Woolworths Group Ltd (No 4)* [2024] SASCA 113 at [15] (Livesey P, Stanley and Hall AJJA) where the Court of Appeal of South Australia distinguished between determining whether a person is a vexatious litigant (which attracts the correctness standard) and whether a primary judge has fallen into error in making orders once the preliminary determination has been made (which attracts the discretionary standard).

31 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 (***Coal & Allied***) at 208 [29] (Gleeson CJ, Gaudron and Hayne JJ); *Miller v Australian Industrial Relations Commission* (2001) 108 FCR 192 at 210-214 [40]-[53] (Beaumont ACJ, Ryan and Madgwick JJ in a judgment of the Court).

53. Contrary to recent statements of a Full Bench of the FWC (albeit in a different context),[32] the conferral of a statutory power by reference to a decision maker's state of "satisfaction"[33] or what they 'think'[34] is not determinative (or even influential) as to the appellate standard that applies to it; "[n]ecessarily, any conclusion that a court [or tribunal] comes to concerning any topic involving the application of an evaluative standard is an expression of what the court thinks".[35] The reference to the FWC's satisfaction in s 385(d) is merely a statutory device to ensure that the criteria in s 389 are not themselves jurisdictional facts.[36]

54. In reaching its conclusion, the Full Court brushed aside the decision of this Court in *SZVFW* in two sentences, on the footing that it was concerned with whether an administrative decision was legally unreasonable (**FC [75] CAB 159**). This amounted to a failure to engage with the substance of the applicable principles.

55. Instead, the Full Court mirrored the ultimate conclusion reached in *Coal & Allied* in respect of a very different statutory power (**FC [76]-[78] CAB 160-161**). That power enabled the Australian Industrial Relations Commission to suspend or terminate protected industrial action because it threatened to "endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or to cause significant damage to the Australian economy or an important part of it". On any view, the breadth of that decision making power was considerable. It was therefore "in a broad sense" a decision that "can be described as a discretionary".[37] However, the determination of the relevant threat issue was also the first of a two-stage process. If a precondition for termination were present, the Commission still retained a pure discretion as to whether or not to terminate or suspend the industrial action, or do

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[32] *Kuiper Australia Pty Ltd* [2024] FWCFB 378 at [13]-[14].

[33] Cf. *Nigro v Secretary, Department of Justice* (2013) 41 VR 359 at 377 and 379 [64] and [70] (Redlich, Osborn and Priest JJA) and *Sun v Chapman* [2022] NSWCA 132 at [1]-[13] (Leeming JA), [27] and [113]-[115] (White JA) and [189] (Brereton JA).

[34] Cf. *R v Bauer* (2018) 266 CLR 56 (***Bauer***) at 65 [9] and 88-89 [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), and the authorities referred to therein; see also *Moore* at 1125 [20] (Gageler CJ, Edelman, Steward, Gleeson, Beech-Jones JJ) where the Court expressly rejected the approaches of the members of the New South Wales Court of Appeal in *DAO v The Queen* (2011) 81 NSWLR 568 (***DAO***) as inconsistent with *Bauer*. In *DAO*, the New South Wales Court of Appeal Court had held that the correctness standard did not apply to the power to admit tendency evidence, including because the power was triggered where the 'court thinks that' the relevant evidence has 'significant probative value': see 770 [27]-[30] (Spiegelman CJ), 783 [99]-[100] (Allsop P), 802 [211] (Kirby J).

[35] *R v Ford* (2009) 201 A Crim R 451 at 483 [107] (Campbell JA), cited with approval in *Bauer* at 88-89 [61].

[36] *D'Amore v ICAC* (2013) 303 ALR 242 at [1] (Bathurst CJ), [241] (Basten JA).

[37] *Coal & Allied* at 205 [20]-[21] (Gleeson CJ, Guadron and Hayne JJ).

neither.[38] It was therefore unsurprising that the Commission was found to have "some latitude as to the decision to be made"[39] such that appellate intervention could only follow upon showing an error in the *House v King* sense. The statutory power under s 389 is qualitatively different. It invites a "yes" or "no" answer to a question raised on facts pertaining to a particular employment relationship rather than the interests of indeterminate members of the public.

56. Further, the Full Court wrongly focused on the reference to *Coal & Allied* that appears in paragraph 2320 of the EM. That paragraph clarified that the appellate jurisdiction of a Full Bench of the FWC was intended to "maintain the existing jurisprudence in relation to AIRC appeals, in particular the decision of the High Court in [*Coal & Allied*]". The Full Court relied on that paragraph for the conclusion that "there was no intention to introduce a new test of appellate review of decisions of this kind" (**FC [79] CAB 161**). However, that misunderstands the central thrust of *Coal & Allied*. The majority there drew a contrast with *Re Coldham; Ex parte Brideson [No 2]*,[40] where the relevant appellate provisions "were not constrained by the need to identify error on the part of the primary decision-maker".[41] The majority in *Coal & Allied* characterised the appeal provision considered in *Brideson* as creating a right of appeal by way of hearing de novo. The appellate provisions dealt with in *Coal & Allied* were found to be "different"; an appeal in that case was held to be by way of rehearing such that the powers of a Full Bench of the AIRC could not be exercised in the absence of error.[42] Objectively speaking, that is the point that the EM sought to reinforce; it did not evince a legislative intent to adopt the discretionary standard to any and all exercises of the FWC's statutory decision-making powers.

57. Finally, the Full Court failed to give substantive content to "reasonableness". While the criterion of "reasonableness" has been aptly described as "protean" in nature,[43] it derives its meaning – and its governing principles – from the particular context.[44] The

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38 Ibid.
39 *Coal & Allied* at 205 [21] (Gleeson CJ, Guadron and Hayne JJ); see also *Moore* at 1124 [15] (Gageler CJ, Edelman, Steward, Gleeson, Beech-Jones JJ).
40 (1990) 170 CLR 267 (Deanne, Gaudron and McHugh JJ).
41 *Coal & Allied* at 204 [15] (Gleeson CJ, Gaudron and Hayne JJ).
42 *Coal & Allied* at 204 [12]-[18] (Gleeson CJ, Gaudron and Hayne JJ).
43 *Minister for Immigration and Multicultural Affairs; ex parte S20/2002* (2003) 77 ALJR 1165 at 1170 [20] (Gleeson CJ). See also *Bropho v Human Rights and Equal Opportunities Commission* (2004) 135 FCR 105 at 129 [83]-[84] (French CJ).
44 *Retail Employees Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359 at 365-366 [25]-[26] (Allsop J).

Full Court's conclusion "confuse[d] uncertainty with indeterminacy"[45] and it ignored the fact that *Warren v Coombes* was itself a case dealing with reasonableness (albeit in the context negligence).[46]

58. The Full Court's conclusion was also at odds with the application of the correctness standard by intermediate appellate courts to "reasonableness" in the contexts of restraints of trade,[47] defamation,[48] apprehended bias,[49] delay in making an administrative decision,[50] setting aside settlement agreements,[51] extending a limitation period.[52] The Full Court's reliance upon *Goodman v Windeyer*[53] and *Singer v Berghouse*[54] (**FC [80] CAB 161**) was misplaced. Those cases, like *Coal & Allied*, dealt with a decision-making process consisting of two stages that were "inextricably intertwined", and which resulted in the grant of forward looking and purely discretionary relief;[55] the same cannot be said of the distinct question posed by ss 385(d) and 389(2).

59. The application by the second Full Bench of the discretionary standard caused it to ask itself the wrong question and amounted to a misunderstanding of the applicable law; it was an error that was of a jurisdictional kind.[56] There is a realistic possibility that the Full Bench's decision could have been different had the error not occurred.[57] In the

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45 *SZVFW* at 591 [150] (Edelman J).
46 (1979) 142 CLR 531 at 552 (Gibbs ACJ, Jacobs and Murphy JJ).
47 *McMurchy v Employsure Pty Ltd; Kumaran v Employsure Pty Ltd* (2022) 409 ALR 199 at 227 [130], 232 [158]-[159] (Gleeson JA, Leeming JA and Kirk JA agreeing).
48 *Bazzi v Dutton* (2022) 289 FCR 1 at 7-9 [22]-[28], 15 [53] (Rares and Rangiah JJ, Wigney JJ agreeing).
49 *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 218 at 228 [41] (Bromberg, Murphy and Markovic JJ).
50 *Patrick v Australian Information Commissioner* (2024) 304 FCR 1 at 13 [59] (Bromwich, Abraham and McEvoy JJ).
51 *Trustees of the Christian Brothers v DZY (a pseydonym)* [2024] VSCA 73 at [10(c)], [16]-[18], [93]-[102] (Beach and Macaulay JJA) and [154] (Lyons JJA agreeing).
52 *Waldron v O'Callaghan* [2024] VSCA 196 at [31]-[40] (Ferguson CJ, Macaulay JA and Tsalamandris AJA). As against the cases referred to at fn 48-52, see *State of Queensland (Queensland Health) v Hume (No. 3)* [2024] ICQ 3 at [59] (Merrell DP) as to the standard of review applicable to public service appeals in Queensland, which are by reference to whether a primary decision was 'fair and reasonable'.
53 (1980) 144 CLR 490.
54 (1994) 181 CLR 201.
55 *Cooke v Tweed Shire Council* [2024] NSWCA 50 at [1], [2]. [35]-[36] (Basten JA, Ward P and Gleeson JA agreeing) explaining *Singer v Berghouse*.
56 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & anor* (2024) 98 ALJR 610 (***LPDT***) at [3] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), [38] Beech-Jones J agreeing.
57 *LPDT* at [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), [38] Beech-Jones J agreeing. The realistic possibility is apparent having regard to the Full Bench's determination as to the error that it found was made out (Fourth Decision at [74] CAB 116) as well as to the other doubts expressed by the Full

circumstances, if the Court rejects grounds 1(a) and 1(b) of the appeal, but finds in favour of the appellant on ground 2, the appropriate relief is to remit the matter to the FWC to be decided according to law.

PART VII: ORDERS SOUGHT

60. The appeal be allowed.

61. Set aside the order of the Full Court of the Federal Court of Australia dated 5 April 2024 and in its place order that:

(a) a writ of *certiorari* issue to the FWC removing and quashing the decision of Catanzariti VP, Bissett C and Wilson C made on 1 September 2022 in [2022] FWCFB 166 and the decision of Riordan C made on 24 December 2021 in [2021] FWC 6414;

(b) a writ of *prohibition* issue to the FWC to compel it to cease dealing further with the unfair dismissal applications filed by the respondent employees.

62. In the alternative to orders set out in paragraph 61, set aside the order of the Full Court of the Federal Court of Australia dated 5 April 2024 and in its place order that:

(a) a writ of *certiorari* issue to the FWC removing and quashing the decision of Catanzariti VP, Bissett C and Wilson C made on 1 September 2022 in [2022] FWCFB 166; and

(b) a writ of *mandamus* issue to the FWC to compel it to exercise its jurisdiction to determine the appellant's appeal of the decision of Riordan C made on 24 December 2021 in [2021] FWC 6414 in accordance with the law.

63. There be no orders as to costs.[58]

Bench about the Commissioner's reasoning: CAB 114 [63]; CAB 118 [78(4)]; CAB 119 [78(9)]; CAB 121 [82]-[83].

[58] Although the Court is exercising appellate jurisdiction under s 73 of the Constitution, the proceeding is "in relation to a matter arising under [the FW Act]". As such, costs may only be ordered on the limited bases set out in s 570 of the FW Act, none of which are relevant in the present case: Note the amendments to s 570 enacted by the *Fair Work Amendment Act 2012* (Cth) after the decision in *Board of Bendigo Regional Institute of Technical and Further Education [No 2]* (2012) 248 CLR 549.

PART VII: TIME ESTIMATE

64. It is estimated that up to two hours will be required for the appellant's oral argument (including reply).

Dated: 24 October 2024

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Bret Walker
5th Floor St James' Hall
02 8257 2500
caroline.davoren@stjames.net.au

……..
Adam Pomerenke
Level 17 Chambers
07 3052 0002
ampomerenke@qldbar.asn.au

……..
Pawel Zielinski
Callinan Chambers
07 3333 9901
pzielinski@qldbar.asn.au

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HELENSBURGH COAL PTY LTD**
Appellant

and

NEIL BARTLEY AND OTHERS NAMED IN THE SCHEDULE
Respondents

ANNEXURE

Pursuant to Practice Direction No 1 of 2019, the Appellant sets out below a list of the statutes referred to in these submissions.

No.	Description	Version	Provisions
	Statutory provisions		
1.	*Fair Work Act 2009* (Cth)	Compilation No. 37 as at 9 April 2020	ss 381, 385, 389, 396, 570, 604,[59] 607[60]

[59] Section 284 of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) effected an amendment to s 604 of the FW Act, which is not material to the proceeding.
[60] Section 8 to Schedule 1 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) effected amendment to s 604 of the FW Act, which is not material to the proceeding.

SCHEDULE OF PARTIES

JAKE BENNETT
Second Respondent

JAMES BRAJAK
Third Respondent

ALEX WINDISCH
Fourth Respondent

CHRISTOPHER DALE
Fifth Respondent

KENNETH DRYDEN
Sixth Respondent

LUKE DUFFY
Seventh Respondent

LEONARD FARRANCE
Eighth Respondent

STEPHEN GILMOUR
Ninth Respondent

BRENDAN GORNALL
Tenth Respondent

TAYLOR GOSLING
Eleventh Respondent

MURRAY GRAY
Twelfth Respondent

TIM HENDERSON
Thirteenth Respondent

JOSHUA HOGG
Fourteenth Respondent

STUART KEMP
Fifteenth Respondent

CLINT LUCK
Sixteenth Respondent

RYAN MARTIN
Seventeenth Respondent

SIMON WALDER
Eighteenth Respondent

CHRISTOPHER MURDOCH
Nineteenth Respondent

GREGORY REMFRY
Twentieth Respondent

RYAN SCHUSTER
Twenty-First Respondent

BORO SELAK
Twenty-Second Respondent

FAIR WORK COMMISSION
Twenty-Third Respondent